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ICANN 2.0: MEET THE NEW BOSS¹

A. Michael Froomkin^{*}

I. INTRODUCTION

The articles in this Symposium each take a different approach to the vexed problem of writing about an institution in the midst of rapid evolution and reform. In the middle of 2002, when our authors were drafting their contributions, the Internet Corporation for Assigned Names and Numbers (ICANN)'s² emerging plans for a

1. The change, it had to come
We knew it all along
We were liberated from the fold, that's all
And the world looks just the same
And history ain't changed

....

I'll tip my hat to the new constitution
Take a bow for the new revolution

....

Meet the new boss
Same as the old boss

The Who, *Won't Get Fooled Again*, WHO'S NEXT (MCA Records 1971).

* Professor, University of Miami School of Law. I am grateful to the participants in this Symposium for their contributions, and for their comments on parts of an earlier draft of this Introduction. For full disclosure of my institutional affiliations relating to ICANN, see A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 718 (2002), available at <http://personal.law.miami.edu/~froomkin/articles/udrp.pdf>.

2. The Internet Corporation for Assigned Names and Numbers (ICANN) describes itself as "the non-profit corporation that was formed to assume responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under U.S. Government contract by IANA and other entities." About ICANN, at <http://www.icann.org/general/abouticann.htm> (last updated Feb. 24, 2003). For a richer description see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route*

new structure could plausibly have been projected as anything along a continuum ranging from radical reform, to a simple purge of dissidents, to moving the deck chairs on the Titanic. We had hoped to encourage speculation about ICANN 2.0—what we then thought of as the ICANN of the future. As happens with the Internet, that hope was overrun by subsequent events, in this case ICANN's rapid reaction to ICANN CEO Stuart Lynn's public statement that its structure was unworkable, and that change was necessary.³ ICANN 2.0 was not going to be an academic exercise—it was happening around us.

As the weeks passed, the nature of the change in store for ICANN began to come into focus. However, even in early 2003, certain key points relating to the composition and functioning of the all-important "nominating committee" that will pick much of the next ICANN Board remain uncertain. The delays inherent in traditional "dead tree" legal scholarship thus created a danger that any analysis of ICANN's future would be about ICANN's past before the writing saw print. Indeed, any speculation about an improved ICANN risked becoming overrun by events. This at first fluid, and then increasingly inelastic, state of affairs created a substantial intellectual and literary challenge. The contributors to this Symposium have each risen to that challenge in a distinctive way, but there are also some interesting commonalities in both approach and focus, commonalities which reflect something real about ICANN and about Internet legal scholarship.

II. THE CONTRIBUTIONS

In a remarkably efficient manner, Wolfgang Kleinwächter lays out the main elements of the transformation from ICANN 1.0 to the present.⁴ Indeed, for anyone new to the subject—or anyone who looked away for a short while—it would be hard to better his

Around the APA and the Constitution, 50 DUKE L.J. 17 (2000), available at <http://www.law.miami.edu/~froomkin/articles/icann.pdf>.

3. M. STUART LYNN, PRESIDENT'S REPORT: ICANN—THE CASE FOR REFORM (Feb. 24, 2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

4. See Wolfgang Kleinwächter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, 36 LOY. L.A. L. REV. 1103 (2003).

summary of the new state of affairs as it relates to the distribution of the power over ICANN and thus the resources over which it has de facto control: ICANN 2.0 looks like a deal between (some) industries and (some) governments which sidelines the global Internet users.⁵ His paper zeros in on one of the most important features of the new ICANN—participating governments that previously had (formally) only an advisory role are now to have a virtual veto on the affairs of a private corporation. Both the old and the new dispensation were peculiar, but the new one is an especially odd state of affairs. Professor Kleinwächter is not sanguine about it, observing that “[a] greater governmental role will not make global Internet governance easier”⁶ as increased influence over the Internet may tempt governments to mischief. If governments are the winners of the poisoned chalice of the domain name system (DNS) power then, as Professor Kleinwächter also observes, “[t]he losers of the present redistribution of power in cyberspace are the Internet users.”⁷ Here too, Professor Kleinwächter is not too optimistic, for all lessons from more than “[f]ifteen years of discussion on Internet governance demonstrate that . . . mechanisms that exclude main stakeholder-groups have difficulties functioning.”⁸

The team of David R. Johnson, David Post, and Susan Crawford (JP&C) also direct their attention to the intricacies of ICANN’s reform.⁹ Rather than focusing on the composition of the Board, they concentrate on how it will function. Their point of departure is the new ICANN’s alteration of the role of the Board and the consequent change in the relationship between the corporation and those it regulates. The new ICANN bylaws empower the Board to act without, or even against, a consensus of those affected by the decision. JP&C find this alarming, believing that “abandoning consensus as the basis for ICANN policy-making is neither in

5. *See id.* at 1124.

6. *Id.* at 1122.

7. *Id.* at 1123.

8. *Id.* at 1124.

9. David R. Johnson, David Post & Susan P. Crawford, *A Commentary on the ICANN “Blueprint” for Evolution and Reform*, 36 LOY. L.A. REV. 1127 (2003).

ICANN's best interests nor in the best interests of the Internet community."¹⁰

The JP&C paper provides close analysis of a legal text setting out ICANN's proposed reform. Inside that legalistic structure, however, we find a quite romantic approach to ICANN's past and present, in both the positive and negative senses of that term. That the Board's new power to act unilaterally represents a great change from the text of most of the previous thirteen drafts of the ICANN bylaws cannot be doubted.¹¹ The authors see this as a watershed, and if as a result ICANN now feels empowered to act unilaterally even more frequently, they will be proven to be right. There is often a difference, however, between the law on the books and the law on the ground, and one might reasonably ask to what extent this new muscular Board represents anything more than the codification of ICANN's prior practices. The authors have been eloquent voices for consensus policy-making,¹² but the evidence that ICANN has actually ever engaged in consensus-finding, much less adhered to a consensus, is fairly thin. Perhaps, on this point, the new bylaws are simply truth in labeling.

JP&C's argument that the new bylaws represent a substantive shift has two pillars. The first is their claim that the Board has, on at least one occasion, come close to achieving consensus

10. *Id.* at 1127.

11. The current bylaws can be found at ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2002), *available at* <http://www.icann.org/general/bylaws.htm>. Links to the thirteen previous versions of the bylaws, spanning a period of just over four years, can be found at ICANN, Bylaws Archives, *at* <http://www.icann.org/general/archive-bylaws> (last updated Feb. 25, 2003).

12. See David R. Johnson & Susan P. Crawford, *What an ICANN Consensus Report Should Look Like*, *available at* http://www.icannwatch.org/archive/what_icann_consensus_should_look_like.htm (last visited Mar. 3, 2003); David R. Johnson & Susan P. Crawford, *What's Wrong With ICANN—And How to Fix It*, http://www.icannwatch.org/archive/whats_wrong_with_icann.htm (last visited Mar. 3, 2003); David R. Johnson & Susan P. Crawford, *Why Consensus Matters: The Theory Underlying ICANN's Mandate to Set Policy for the Domain Name System*, *available at* http://www.icannwatch.org/archive/why_consensus_matters.htm (Aug. 23, 2000); David Post, *ICANN and the Consensus of the Internet Community*, *available at* http://www.icannwatch.org/archive/icann_and_the_consensus_of_the_community.htm (Aug. 20, 1999).

policy-making.¹³ Alas, their exemplar is ICANN's adoption of the Uniform Dispute Resolution Policy (UDRP). As the only person to have participated in every phase of the development of the UDRP, some of it as the closest thing to a consumer representative,¹⁴ I found the claim that "[the UDRP] was not vigorously opposed by any substantially affected party"¹⁵ somewhat at odds with my own memories of the events.¹⁶ The claim that the UDRP is "the closest thing that ICANN has to a consensus policy"¹⁷ risks romanticizing its past. It is a claim that ICANN itself did not dare make at the time.¹⁸ Or worse, it may be true—and unintentionally ironic.

13. See Johnson et al., *supra* note 9, at 1130.

14. See A. Michael Froomkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process*, in *REGULATING THE GLOBAL INFORMATION SOCIETY* 211 (Christopher T. Marsden ed., 2000), available at <http://www.law.miami.edu/~froomkin/articles/tprc99.pdf>.

15. Johnson et al., *supra* note 9, at 1130.

16. See Froomkin, *supra*, note *; A. Michael Froomkin, *A Commentary on WIPO's: The Management of Internet Names and Addresses: Intellectual Property Issues*, <http://www.law.miami.edu/~amf/commentary.pdf>. (May 17, 1999); A. Michael Froomkin, *Comments on ICANN Uniform Dispute Policy: A Catalog of Critical Process Failures; Progress on Substance; More Work Needed*, available at <http://www.law.miami.edu/~amf/icann-udp.htm> (Oct. 13, 1999).

17. Johnson et al., *supra* note 9, at 1130.

18. ICANN did not attempt to identify the UDRP as a consensus policy, binding registrars or registries. It simply negotiated their submission to it: the parties agreed to treat the UDRP as though it were a consensus policy. See, e.g., ICANN, *ICANN-NSI Registry Agreement Part 1(e)*, available at <http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm> (last modified Nov. 10, 1999) ("For all purposes under this Agreement, the policies identified in Appendix A adopted by the ICANN Board of Directors before the effective date of this Agreement shall be treated in the same manner and have the same effect as 'Consensus Policies.'"); *id.* at Appendix A, available at <http://www.icann.org/nsi/nsi-registry-agreement-appa-04nov99.htm> (listing only UDRP) (last modified Nov. 8, 1999); see also David R. Johnson, *Why A General Assembly Matters*, <http://cyber.law.harvard.edu/icann/stockholm/archive/johnson-ga.html> (last visited Mar. 4, 2003).

You'll notice there is only **one** actual 'consensus policy' currently mentioned in the contracts. And that's the UDRP—sort of a grandfathered deal that was worked out before the full mechanisms for development of consensus policies—and enforcing them via contracts—had been worked out. . . [I]t reflects a lack of work by those in this room to engage in the true dialogue needed to find commonly agreeable policy solutions to some real problems.

Id.

JP&C's argument is romantic in another, more positive way. This essay reminds us that there are and were people who had high hopes for ICANN as a new, consensus-based form of governance. The problem was that ICANN was never as good as they wanted it to be. In that sense, the new structure truly is a watershed moment, for it means that ICANN and its defenders have put aside even the aspirational aspect of their project, set aside any revolutionary, devolutionary, anti-government clothes which might have pinched occasionally when they acted like rent-seekers. There is nothing quite so mournful as a disappointed romantic, and more than a whiff of this disappointment emanates from JP&C's somewhat sorrowful account of ICANN's likely future—one where an assertive Board runs headlong into its messy contractual obligations to refrain from imposing non-consensus policies on the early registries and winds up in court.

Dan Hunter's provocative article takes this disenchantment two steps further: The fault is not in ICANN, but in ourselves, or rather in our mistakenly believing that what romantics mean by "democracy" represents our genuine political commitments.¹⁹ If we do not really believe in democracy as more than an "empty shell of a concept," surely it would be unreasonable to demand that ICANN adhere to some conception of that idea. Indeed, Hunter finds it strange that ICANN critics demand that ICANN live up to its commitments, suggesting that whatever its flaws (and he is remarkably sanguine about them, claiming to find only "equivocal evidence" of capture and bias), the ICANN bottom line has been "reasonably open and responsive" and "more transparent and accountable than the vast majority of" private non-profits and especially for-profits.²⁰ These, he suggests, are the right standard of comparison, not some idealized and unrealistic concept of democracy which never was and never could be.

To the extent that Professor Hunter wants to persuade us that a quasi-governmental, pseudo-international (but U.S.-based and controlled) Internet-regulatory²¹ entity such as ICANN was a lousy

19. See Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (2003).

20. *Id.* at 1159.

21. I refuse to call ICANN "Internet-based" since its staff and Board insist on doing so much at the quarterly in-person meetings.

platform on which to graft an online election, I think there will be surprisingly few who disagree. Similarly, there is now broad but not unanimous agreement that the task of running a high-quality online open-ended election, at which ICANN failed so spectacularly, would also have been beyond even people of good faith.²² The more difficult question is what follows from this premise.

Once one decides an institution like ICANN cannot really be democratic or accountable in any of the rich meanings of those terms, it would seem to follow that one should not ask (or allow) that institution to take on any of the social roles that we reserve for democratic bodies, or for institutions accountable to democratic bodies. However, Professor Hunter—invoking *Getting Past Democracy*²³—suggests that this is just more misguided romanticism, because ICANN is really not much worse than the largely undemocratic mechanisms that characterize the modern administrative state, and it would be both churlish and unproductive to replace one imperfect mechanism with another that is, at best, not much better.²⁴ As someone who spent a couple of years in the ICANN process, I can only say that I wish it were only as bad as the average agency—and that there was some guarantee of due process, or even the threat of judicial review for “arbitrary and capricious” decisions.²⁵ Few would quarrel with *Getting Past Democracy*’s focus on the need for thick description of what institutions actually do, and how they do it. That Professor Hunter finds ICANN adequate in this regard must be either because he has a very gloomy

22. See *infra* text accompanying notes 39–41.

23. See Hunter, *supra* note 19, at 1153–54 (relying on Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001)).

24. Professor Hunter clearly is not troubled by my argument that the U.S. government improperly subcontracted out the job of regulating the DNS. See Froomkin, *supra* note 2. He responds that this critique is just a special form of the more general complaint that “ICANN can only be legitimate if it becomes democratic . . .” Hunter, *supra* note 19, at 1177. The very complaint he wants to raise is unfounded because that particular idea of “democracy” is Utopian. If this is a claim about ICANN only, it may well be correct, but it hardly seems an answer to a critique of how the United States regulates and governs.

25. See 5 U.S.C. § 706.

view of ordinary agencies, or a somewhat rosy view of ICANN. The paper admits either, or both, interpretations.²⁶

The Hunter, Kleinwächter, and JP&C papers are straightforwardly ICANN-centric. Other actors appear, but our authors' interest in them is in relation to the central protagonist. In contrast, in the other two papers ICANN is not always center stage, although like Hamlet's ghost, it is never far from our minds.

Herbert Burkert's poetic and metaphoric article²⁷ contains a thick description of the institutional interests and motivations of the European Union's course across the information ocean. This is particularly useful for U.S. readers as the European Union is surely the second most important governmental player in DNS politics after the United States. In Professor Burkert's account, the E.U. (and usually, the member states, which is not quite the same thing) had three major strategic considerations relating to the DNS. First, the E.U. sought to pry the DNS from the United States' control and force it into a more internationalized control regime. ICANN was seen as the furthest way-station on this journey to which the United States could be coaxed.²⁸ Second, the E.U. began to see ICANN matters through the prism of its own increasing internal concerns relating to E.U. democracy,²⁹ transparency, and enhancement of economic competition.³⁰ Seen this way, both ICANN's internals and its outputs began to look less ideal. Third, the E.U. strongly desired to establish a .EU top-level domain (TLD), something that required first internal agreement, then ICANN approval.³¹

These three policy objectives had two tactical consequences. On the one hand, the short-term .EU objective proved difficult to implement, both because of internal disputes as to who should run the registry and dispute over the terms that would bind the registry.

26. See *supra* text accompanying note 20 (discussing Professor Hunter's optimistic view of ICANN).

27. See Herbert Burkert, *About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN*, 36 LOY. L.A. L. REV. 1185 (2003).

28. See *id.* at 1193.

29. See *id.* at 1192-93.

30. The E.U.'s concern with process virtues such as legitimacy and transparency in ICANN is not as visible from a distance as it seems to be from up close.

31. See Burkert, *supra* note 27, at 1213.

Lurking in the background were concerns about what a .EU registry under the Commission's control might imply for the regulation of E.U. member state's country code top-level domains (ccTLDs). Together, these .EU issues inhibited the E.U. from playing as assertive a role in ICANN matters as it might have. On the other hand, if only because of the E.U. member states' substantial representation at ICANN meetings, the E.U. encouraged the assertiveness of the ICANN Governmental Affairs Committee (GAC) even though this is one of the least transparent parts of ICANN.³²

Professor Burkert speculates that concerns with legitimacy and transparency may increase the E.U.'s discomfort with treating the DNS, via ICANN, as the "privatized" subject of California law or, perhaps, of private international law. Instead, he wonders if there might not be some way to transform the DNS into a subject of public international law, an interest the E.U. signaled as early as its reply to the Green Paper.³³ The obvious way to achieve this would be through a treaty, but even in the absence of one, Professor Burkert sees possibilities for soft law,³⁴ or an international regime analogous to the rules of equitable participation in unique resources.³⁵ Under such a system, the United States might be considered the trustee of the unique resource for the global community.³⁶ Yet, as Professor Burkert has argued elsewhere, a state acting as trustee for such a resource must administer it consistently with its domestic law³⁷—something that I at least have argued is not currently the case.³⁸

Consonant with the tone of JP&C's contribution, Professor Burkert strikes a eulogistic note for ICANN's elections. Whether or

32. *See id.* at 1199–1200.

33. *See id.* at 1190.

34. *See id.* at 1229–31.

35. *See id.*

36. *See id.* at 1231.

37. *See* Herbert Burkert, Panel Statement, ICANN Study Circle, Responsibility for ICANN—Stability and Legitimacy 1–2 (Feb. 4, 2001), available at <http://www.herbert-burkert.net/ARCHIV/Zurich-E.pdf>.

38. *See* Froomkin, *supra* note 2; *see also* A. Michael Froomkin & Mark Lemley, *ICANN and Anti-Trust*, 2003 ILL. L. REV. __ (forthcoming).

not the intentionally sabotaged ICANN elections³⁹ deserve to be compared to Ezra Pound's glorious hour,⁴⁰ it is intriguing to hear of the tensions that the E.U. may feel as a result of the move away from the election model. On the one hand, the new purely advisory at-large class of membership will seem comfortable, familiar, perhaps conducive to stability. On the other hand, it may be costly in the legitimacy arena, a topic to which the E.U. has become sensitized due to complaints about its own democratic deficit.⁴¹

Stefan Bechtold's fascinating paper begins by instructing that while "ICANN uses its technical control over the DNS as undue leverage for policy and legal control . . . over activities that depend on the DNS," this is not a unique problem.⁴² Rather, this is but one example of "governance problems that occur in a set of technologies known as 'namespaces.'"⁴³ His goal is nothing less than a general theory of the relationship between technology and law as it relates to namespaces—a general theory of namespace governance, although the theory here is more of the input-output sort than a philosophy.

Bechtold's central observation is that "technical control over a namespace creates levers for the intrusion of politics, policy, and regulation,"⁴⁴ although the degree of control will depend on many factors including the "technological architecture" of the space itself,⁴⁵ notably whether the space is a "bottleneck namespace" in which the assignment of names has to be controlled in some way. But technology is not the sole determinant, and indeed the technology we use is not preordained, as "namespaces are 'social construct[s] . . . [which] reflect the same biases as the culture that

39. See Ted Byfield, *MAL metastasizes: ICANN in denial*, ROVING REPORTER, Jul. 27, 2000, at http://www.tbtf.com/roving_reporter/icann1.html#13; Ted Byfield, *ICANN: transparency through obscurity*, ROVING REPORTER, Oct. 5, 2000, at http://www.tbtf.com/roving_reporter/icann2.html (Oct. 5, 2000).

40. See Burkert, *supra* note 27, at 1237.

41. See *id.* at 1237.

42. Stefan Bechtold, *Governance in Namespaces*, 36 LOY. L.A. L. REV. 1239 (2003).

43. *Id.* at 1240.

44. *Id.* at 1244.

45. *Id.*

creates”” them.⁴⁶ Given the contingent nature of most social constructs, it follows, therefore, that in namespace design too, “history matters.”⁴⁷

Bechtold modestly describes his paper as fundamentally taxonomic, and to the extent that he eschews any overt policy conclusions, that is perhaps an accurate self-assessment. Nevertheless, it is a wide-ranging and thought-provoking taxonomy. To mention only a few of the interesting juxtapositions, along the way he compares ICANN’s management of the DNS namespace to Microsoft’s management of the Microsoft Passport namespace, discussing the interplay of contractual and technological controls.⁴⁸ Digital rights management (DRM), DNA sequence databases and many others each are considered and classified.

Of particular interest in the ICANN context is Bechtold’s discussion of “federated namespaces” such as the telephone networks, the Internet, and some P2P systems.⁴⁹ In a federated namespace, different parts of the space are controlled by different entities, all of which share a collective agreement to prevent any overlap or collisions between their spaces. This seems an attractive model for the DNS, as it offers increased possibilities for economic and regulatory competition. Bechtold, however, is cautious. Mere interconnection between participants in a federated namespace “does not necessarily lead to well-functioning competition between them” if there are prohibitively high switching costs.⁵⁰

Similarly, a comparison of the regulation of IP numbers and “Ethernet address spaces” with the DNS shows that “[n]ame scarcity may necessitate a coordination of the name assignment process” but it does not “necessitate any tight control over other, policy-related issues of the namespace.”⁵¹ This also sounds hopeful, although Bechtold is too polite to point out the obvious: in theory, control over IP numbers, and perhaps even ethernet address space, might

46. *Id.* at 1312 (quoting Hope A. Olson, *Mapping Beyond Dewey’s Boundaries: Constructing Classificatory Space for Marginalized Domains*, 47 LIBR. TRENDS 233 (1998)) (alterations in original).

47. *Id.* at 1303.

48. *See id.* at 1257.

49. *See id.* at 1275–83.

50. *Id.* at 1280.

51. *Id.* at 1288.

also be leveraged to impose tighter control instead of the present loose coordination.

Perhaps the most original observation in the paper is the comparison of the DNS to the Internet Assigned Numbers Authority (IANA)'s⁵² management of "port number space."⁵³ Bechtold argues that a critical element of the Internet's success is that twenty-five percent of port number space remains permanently unallocated in order to allow innovation in end-to-end applications.⁵⁴ He contrasts this approach to the current management of the DNS, which—alarmingly—he sees as leaning towards the architecture of DRM schemes, the DNS being relatively information-rich, and showing signs of possibly getting even richer.⁵⁵

Another cautionary tale with immediate implications is Bechtold's account of library cataloging codes. The difficulties caused by the cultural assumptions, and now anachronistic assumptions, built into the Library of Congress bibliographic coding system implicitly contains strong cautions for people who want hierarchical semantic meaning coded into domain name space. The ICANN Board's recent request that the GNSO Names Council make a recommendation "on whether to structure the evolution of the generic top-level namespace and, if so, how to do so,"⁵⁶ was understood by some as introducing the possibility of imposing taxonomic namespaces;⁵⁷ it seems clear from Bechtold's paper that this would be positively silly.

52. IANA, the Internet Assigned Numbers Authority, is the name given to the job of assigning port numbers. Originally handled by Jon Postel and Joyce Reynolds, it is now performed by ICANN pursuant to a contract with the U.S. Department of Commerce. See Froomkin, *supra* note 2, at 85–87.

53. See Bechtold, *supra* note 42, at 1290 n.209.

54. See *id.* at 1290.

55. See ICANN, FINAL REPORT OF THE GNSO COUNCIL'S WHOIS TASK FORCE: ACCURACY AND BULK ACCESS Part II, (Feb. 6, 2003), at <http://www.dnso.org/dnso/notes/20030206.WhoisTF-accuracy-and-bulkaccess.html>.

56. ICANN, PRELIMINARY REPORT: FOURTH ANNUAL MEETING OF THE ICANN BOARD IN AMSTERDAM (Dec. 15, 2002), at <http://www.icann.org/minutes/prelim-report-15dec02.htm>.

57. See Posting of Danny Younger to ga@dnso.org, (Feb. 7, 2003), at <http://www.dnso.org/clubpublic/ga/Arc12/msg00224.html> (last visited Mar. 3, 2003).

III. SOME COMMONALITIES

Amidst all this diversity, however, there are common themes that place all these essays firmly in the camp of second generation Internet scholarship. The first commonality—a clean break from exuberant first generation Internet scholarship⁵⁸—is a recognition that we are not (or, in the case of JP&C, perhaps no longer) writing on a blank slate and that the DNS wars are in no way *sui generis*.⁵⁹ History defines and constrains our choices, in both the accumulated toxins from ICANN's rocky first years and baggage imported from external sources, such as the E.U.'s struggles with legitimacy and transparency.⁶⁰ Thus, for example, both the Kleinwächter and Burkert papers reflect the importance of institutional history. Professor Burkert suggests that the coming transformation of ICANN “along the lines of more traditional forms of government cooperation must be seen as a contribution to ‘taming cyberspace,’ or as sort of a belated fulfillment of . . . the ‘law’ of the suppression of radical potential”⁶¹

The conclusion to Kleinwächter's paper goes farthest, inviting us to view the DNS wars as part of a process akin to that by which “new industrialists” extracted increasing degrees of self-rule from the grasp of absolute monarchs.⁶² Professor Kleinwächter finds his analogy in the early days of the Industrial Revolution, drawing the lesson that “the call is not to change the system but to increase its

58. First generation scholarship refers to the body of commentary which, besides labeling the Internet as being an essential tool of democracy, would generally believe that, the “Internet's libertarian culture and diffuse, packet-switching architecture would guarantee that Internet conversation would remain forever unencumbered by government regulation, proprietary control, and commercial artifice.” Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 447–48 (2000). Consequently, if any regulation were to persist, “that regulation would be ‘bottom up’—that is, largely voluntary—rather than ‘top down’—that is, imposed by the government.” Thomas S. Ulen, *Democracy on the Line: A Review of Republic.com by Cass Sunstein*, 2001 U. ILL. J.L. TECH. & POL'Y 317, 329 (2001).

59. One could argue that Milton Mueller's book, *RULING THE ROOT* at least crystalized this revelation, and indeed may have helped cause it. See MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* (2002).

60. See Burkert, *supra* note 27, at 1237–38.

61. *Id.* at 1235.

62. See Kleinwächter, *supra* note 4, at 1125–26.

flexibility for a changing economic environment.”⁶³ Those of us raised on a more Anglo-Saxon-centered curriculum may be unable to savor this analogy without escaping the memory that there were some calls to “change the system” and indeed some quite revolutionary moments along the way.

A second near-commonality⁶⁴—directly related to the first and also placing at least most of these articles firmly in the second generation camp⁶⁵—is a focus on the emerging role of governments (note the plural!) in the DNS wars. As the U.S. government continues, somewhat half-heartedly, to extricate, or seeks to be seen as extricating itself from DNS management, other governments clearly desire to play a more direct role. In this, Stuart Lynn’s original reform proposal—which offered governments seats on the ICANN Board in exchange for agreement to use their coercive powers to force ICANN’s reluctant ‘stakeholders’ to pay its levies⁶⁶—may have been more prophetic than it seemed. If nothing else, this commonality reflects something real about ICANN: governments, via the GAC, are the big gainers in the new structure.

A third theme in at least most of the papers is that the ICANN situation remains very fluid and politically unstable. While they may disagree as to which were the lost opportunities, or even how good those opportunities, though spurned, may have been, there does seem to be some agreement among the papers directly discussing political questions that ICANN’s current reforms do not self-evidently solve the problems Stuart Lynn, and many others, have identified.

IV. FINAL OBSERVATIONS

As all of these articles demonstrate in their own way, the dream that ICANN may have once seemed the harbinger of a new

63. *Id.* at 1125.

64. Note that JP&C may not share in this attribute.

65. In contrast to first generation Internet scholarship, *see supra* note 58, second generation scholarship suggests that the Internet “is not an unmitigated force for good. Instead, the [n]et poses a fundamental danger to democracy.” Dan Hunter, *Philippic.com Republic.com by Cass Sunstein*, 90 CAL. L. REV. 611, 611 (2002). Some (but not all!) second generation scholars go so far as to conclude that the Internet’s threat to democracy presents a “compelling case for governmental regulation (top-down) of the Internet” if only “to keep that medium open to expressive activity.” Ulen, *supra* note 58, at 326.

66. *See* LYNN, *supra* note 3.

decentralized form of government is quite firmly dead. While we have not in any way resolved to our common satisfaction how to manage the DNS, or what role an ICANN-like body should play in it, the chance that anyone will point to ICANN as a model for the regulation of anything else now seems comfortably small. We must look elsewhere when dreaming of a computer-enhanced, legitimate, participatory mode of government.⁶⁷

That leaves the vexed question with which we began: how to govern the DNS itself. The articles in this Symposium contribute to our understanding of the many constraints that define the solution space, even if the solution itself remains frustratingly out of reach.

67. See, e.g., A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003).

